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NO. 84-0315(5)

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

LEONARD G. LEVERSON,

Appellant,

v.

WILLIAM H. CONWAY, COMMISSIONER, VERMONT DEPARTMENT OF MOTOR VEHICLES,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF VERMONT

PETITION FOR REHEARING

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Appellant respectfully moves this Court for an order (1) vacating its order of October 29, 1984, dismissing the appeal herein for want of a substantial federal

question, and (2) noting probable jurisdiction. Appellant's grounds for this motion are as follows:

> I. THIS COURT SHOULD GRANT A REHEARING IN LIGHT OF ITS NOTATION OF PROBABLE JURISDICTION IN HOOPER V. BERNALILLO COUNTY ASSESSOR, NO. 84-231 (U.S. Oct. 9, 1984).

Since the filing of the jurisdictional pleadings in this case, this Court has noted probable jurisdiction in another case raising the question whether it violates the Equal Protection Clause to grant state tax benefits to residents of longstanding while denying them to newcomers. Hooper v. Bernalillo County Assessor, No. 84-231, 53 U.S.L.W. 3269 (U.S. Oct. 9, 1984). This case, like Hooper, involves a partial tax exemption denied newcomers because they were not residents of the taxing state at some

time in the past -- here, the time they bought their cars.

Indeed, the burden on newcomers to Vermont at issue in this case affects more people than does the burden on newcomers at issue in Hooper. The tax exemption challenged in Hooper is only available to veterans who became residents of New Mexico before May 8, 1976. Only newcomers to New Mexico who are veterans and who own property subject to taxation suffer the "burden" of that state's discriminatory tax system.[1] Here,

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[1] Cf. Zobel v. Williams, 102 S.Ct. 2309, 2321 n.6 (1982) (O'Connor, J., concurring in the judgment):

"The 'burden' imposed on nonresidents is relative to the benefits enjoyed by residents. It is immaterial, for purposes of the Privileges and Immunities Clause, that the nonresident may enjoy a benefit in the new State that he lacked completely in his former state. The Clause addresses only difference in treatment; it does not judge the quality of treatment a State affords citizens and noncitizens."

all newcomers to Vermont, veterans and non-veterans alike, who own cars are penalized in comparison to all Vermont residents of longer standing.

As Justice Powell has remarked in another context, "[t]he threat of multiple taxation based solely on domicile simply is incompatible with the structural principles of a federal system recognizing as 'fundamental' a constitutional right to travel." Cory v. White, 102 S.Ct. 2325, 2334 (1982) (Powell, J., dissenting, joined by Marshall and Stevens, JJ.); see also id. at 2330 (Brennan, J., concurring in the judgment). In this case, Vermont imposes a form of multiple taxation -- a use tax with no credit for sales tax paid another state -- only on those who were residents of another state at the time they purchased their cars. This case,

like Hooper, thus squarely presents the question whether the structural principles of our federal system permit a state's tax laws to treat some residents of that state less favorably than others solely because the disfavored residents were previously domiciled in another state.

If the denial of a partial tax exemption on property of new residents of New Mexico who are veterans raises a substantial federal question, the denial of a partial tax exemption on motor vehicles of new residents of Vermont surely does so, too. Indeed, the similarity between the issues presented in Hooper and in this case would justify hearing the two cases in tandem, so that this Court could explore in greater detail the proposed justifications and appropriate standard of review for state tax laws that benefit

established residents at the expense of newcomers.

In particular, both cases present this Court an opportunity to clarify the application of right to travel precepts to economic penalties on newcomers which do not fall into the category of denials of "vital benefits" or "basic necessities of life." See Salibra v. Supreme Court of Ohio, 730 F.2d 1059, 1065 (6th Cir.) (suggesting right to travel precepts do not apply unless benefit is "vital") (dictum), cert. denied, 53 U.S.L.W. 3289 (1984); Hooper v. Bernalillo County Assessor, 101 N.M. 172, 679 P.2d 840, 843 (Ct. App.) (distinguishing tax exemption from "such fundamental interests as voting, welfare benefits, or public medical assistance"), cert. denied, 101 N.M. 77, 678 P.2d 705, prob. juris. noted, No. 84-231, 53 U.S.L.W.

3269 (U.S. Oct. 9, 1984); Williams v. Vermont, No. S436-82WnC, unpublished op. at 5 (Vt. Super. Feb. 24, 1983) (Shapiro v. Thompson distinguishable from denial to newcomer of tax credit because denial of tax credit is not a severe penalty and has no dire effects), aff'd mem., 478 A.2d 993 (Vt.), appeal docketed, No. 84-592, 53 U.S.L.W. 3326 (1984); cf. Zobel v. Williams, 102 S.Ct. 2309, 2319-23 (1982) (O'Connor, J., concurring in the judgment) (suggesting an alternative analysis of right to travel claims based on Article IV's Privileges and Immunities Clause).

The notion that states may discriminate against new residents where the discrimination does not result in the denial of a "vital" benefit is a mischievous one, yet seems to be gaining credence. This rule would require courts to identify certain

"vital" benefits (free nonemergency asthma treatments and the like) and to subject any denial thereof to strict scrutiny, while allowing the denial to new residents of such non-"vital" privileges as the ability to drive one's automobile to pass muster upon articulation of a rational basis. This unsatisfactory distinction between "vital" and non-"vital" benefits (not addressed in Zobel v. Williams, 102 S.Ct. 2309 (1982), because the law at issue lacked a rational basis) would be superfluous were the Court to adopt the test Justice O'Connor proposed in Zobel.

The similarity of the right to travel issue in this case to that in Hooper may have been obfuscated by the argument appellee made in his Motion to Dismiss or Affirm that the Vermont Motor Vehicle Purchase and Use Tax does not discriminate against new

residents. That argument was predicated on incorrect premises.[2] The Vermont Supreme Court, unlike the appellee, did not pretend that the tax does not discriminate against new residents. But the Vermont court found a rational basis for the discrimination.

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[2] "If [a Vermont resident's car] were permanently registered elsewhere the owner would not be considered a Vermont resident for purposes of the § 8911(9) credit. Vt. Stat. Ann. tit. 32, § 8911(9)." Motion to Dismiss or Affirm, at 4. Nothing in the text of the statute cited or in any other source of Vermont law supports this assertion. As counsel for the appellee conceded under questioning at oral argument below, cars and trucks may be and frequently are registered in more than one state. No Vermont law deems the owner of a car registered in both Vermont and another state to be, ipso facto, a nonresident of Vermont, even if the car were first registered in the state other than Vermont. Contrary to appellee's suggestion, Vt. Stat. Ann. tit. 23, § 301 only requires Vermont residents to register their cars there when they begin to use them on Vermont roads. Leverson v. Conway, 481 A.2d 1029, 1033 (Vt. 1984) (Jurisd. Statement 13a) ("Only when plaintiff sought the privilege of operating that vehicle on Vermont's highways was he required to register it") (emphasis supplied).

Leverson v. Conway, 481 A.2d 1029, 1032-35 (Vt. 1984) (Jurisd. Statement 16a-24a).

Whether rational basis scrutiny suffices, however, is itself a substantial federal question. Compare Shapiro v. Thompson, 394 U.S. 618, 634 (1968) (laws that penalize right to travel must be subject to strict scrutiny) and Austin v. New Hampshire, 420 U.S. 656, 663 (1975) (Article IV's Privileges and Immunities Clause "erect[s] a standard of review substantially more rigorous than that applied to state tax distinctions among, say, forms of business organizations or different trades and professions") with Sosna v. Iowa, 419 U.S. 393 (1975) (apparently adopting a rational basis standard) and Zobel v. Williams, 102 S.Ct. 2309, 2313-15 (1982) (reserving decision as to whether an economic penalty of a non-"vital"

nature against new residents must be judged by a standard higher than rational basis scrutiny).

Because this case, like Hooper, involves a denial of tax benefits to certain residents of the taxing state based on when they established residence, and because the application of this Court's right to travel precedents to this issue raises a substantial federal question, this Court should vacate its order dismissing the appeal in this case and note probable jurisdiction.

II. THE COMMERCE CLAUSE ISSUE IS SUBSTANTIAL.

This Court has twice expressly reserved decision on the Commerce Clause issue this case presents; individual Justices have expressed opposing views; the lower courts are split; and the great bulk of scholarly commentary is inconsistent

with the approach to the issue the Vermont Supreme Court adopted. True, as Justice Brennan has noted, the Court has "intimated" that a credit against use tax for sales tax paid other states may not be constitutionally required. Halliburton Oil Well Co. v. Reily, 373 U.S. 64, 77 (1963) (Brennan, J., concurring) (citing Henneford v. Silas Mason Co., 300 U.S. 577, 587 (1937)). But, only last year, another Justice of this Court cited Henneford in a way that may fairly be read as intimating a different view.[3]

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[3] "In Henneford, a 2% tax was imposed on the privilege of using products coming from other states. Excepted from the tax was any property, the sale or use of which, had already been subjected to an equal or greater tax. The Court, speaking through Justice Cardozo, upheld the use tax, noting that 'When the account is made up, the stranger from afar is subject to no greater burdens as a consequence of ownership than the dweller within the gates.'" Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue, 103 S.Ct. 1365, 1377 n.3 (1983) (White, J., concurring in part and dissenting in part).

Summary dismissal of this appeal is not an appropriate means for resolution of which of the conflicting 'intimations' contained in Supreme Court dicta ought to be the law. The effect of this Court's summary decision that a use tax without credit for sales tax paid another state is constitutionally permissible will go far beyond influencing the decisions of persons contemplating residence in Vermont who are considering when and where to buy a car, truck, or mobile home.

If this Court allows the dismissal of this appeal to stand, it will signal to the overwhelming majority of states that currently provide a use tax credit for sales tax paid other states that those credit mechanisms are not constitutionally required. The repeal of

those credits would have a far-ranging impact on commerce. Large, expensive mobile equipment, such as automobiles, trucks, oil drilling rigs, construction equipment, and the like, could be subject to annual or more frequent use taxation of 4, 5, or 6 percent or more, depending upon how often such property was moved from state to state. Manufacturers and other consumers of equipment would have a powerful incentive to alter their property use patterns in economically inefficient ways. See Appendix A hereto.

A use tax without a credit for sales tax paid another state, though facially neutral, operates as a tariff on goods imported from other states. Cf. Moorman Manufacturing Co. v. Bair, 437 U.S. 267,

283-89 (1978) (Powell, J., dissenting, joined by Blackmun, J.).[4] This is so because the movement of property from one state to another is not truly a "substantially equivalent event" to a sale; property may be moved from state to state many times while it is owned by the same owner. Where property is moved from state to state and subjected to multiple use taxes, it bears a burden that is not borne where commerce is strictly local. It ought to be remembered that one of the principal reasons for the enactment of the Constitution

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[4] Compare also id. at 287-88 ("[n]either the power to tax nor the police power may be used by the state of destination with the aim and effect of establishing an economic barrier against competition with the products of another state....") (quoting from Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 527 (1935)) with Leverson v. Conway, 481 A.2d 1029, 1035 (Vt. 1984) (Jurisd. Statement 21a) (one of the purposes of the Vermont Motor Vehicle Purchase and Use Tax's denial of credit to nonexempt persons is to "encourag[e] purchases within the state").

was to put an end to the proliferation of state tariffs that existed under the Articles of Confederation.

Appellant respectfully submits that the Commerce Clause issue this case raises should not be decided without plenary consideration of all the effects that may result from a holding that use tax states need not give credit for sales tax paid other states.

CONCLUSION

For the reasons set forth above, as well as those contained in the Jurisdictional Statement, appellant prays that this Court grant rehearing of the order dismissing the appeal, vacate that order, note probable jurisdiction, and review the judgment of the Supreme Court of Vermont.

Respectfully submitted,

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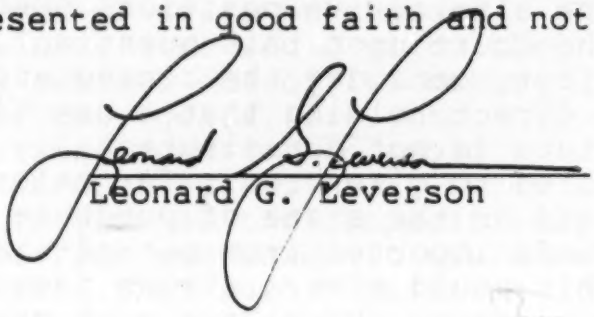
CERTIFICATE OF APPELLANT

As appellant, pro se, I hereby certify that this petition for rehearing is presented in good faith and not for delay.



Leonard G. Leverson

APPENDIX A

Comment, Compensating Use Taxes, 18 Ark. L. Rev. 321, 338-39 (1964-65):

> What effects will follow from the alternative positions open to the Court upon this question? First, consider the consequences of a direct holding that a use tax state is not constitutionally obligated to give credit for sales taxes paid in the state of purchase on goods imported from out-of-state. This would give a strong incentive for states which have such provisions to repeal them. The various states could then give their own merchants a positive advantage over their out-of-state competitors through the taxation statutes at the expense of the national common market. Many transactions which have substantial contact with more than one state would be liable to a potential multiple taxation not borne by the local competitor. This possibility may be greater today due to the apparently more liberal treatment with respect to the imposition of sales taxes than was manifested at the time the Silas Mason case was decided. In essence, it would to a degree subject interstate trade to the mercy of lawmakers whose objectivity might be affected by considerations of short-run self-interest. Such an attitude appears to have little virtue other than consonance with the idea that every state has the right to frame its tax structure without reference to what other states have done.

Following the other alternative would appear to be in the interest of the nation in the long run. To require that credit be given for sales tax paid in the state of purchase would assure relative equality of consumption tax burden between in-state and out-of-state purchasers, and at the same time would allow the use tax to achieve one of its ostensible legitimate goals, i.e., to neutralize the incentive to avoid sales tax through out-of-state purchasing. In view of the comparatively small yield from use taxes it could hardly be said that such a position would bring about a fiscal disaster at the state level. On the whole it seems this position would allow consumption taxes to be utilized as a means for raising revenue and protecting the sales tax without placing interstate commerce at a competitive disadvantage. As has been stated by a former member of the Court, this is a choice "between the state of origin and that of market [State of consumption] for the exercise of the exclusive power to tax . . ." The burden caused when both a sales and use tax are levied could be equally well eliminated by prohibiting the state of sale from levying any excise thereon. However, practical as well as conceptualistic difficulties appear to render this an unlikely solution to the problem. In the final analysis, the offsetting credit provision appears to be a proper safeguard to keep interstate trade unfettered by provincialisms manifested in taxing statutes.
(footnotes omitted).